MALAYSIAN REPORTS

PUBLIC PROSECUTOR v. LIM ENG CHYE

[F.C. (Ong Hock Sim, Raja Azlan Shah and Chang Min Tat F.JJ.) December 6, 1977]

[Penang — Federal Court Criminal Appeal No. 9 of 1977]

Criminal Law and Procedure — Appeal against acquittal — Credibility of witnesses — Finding of fact by trial judge — Internal Security Act, 1960, s. 57.

This was an appeal against the acquittal of the respondent on two charges of having under his control a firearm and of possession of ammunition, offences under section 57(1)(a) and 57(1)(b) respectively of the Internal Security Act, 1960. The trial judge acquitted the respondent as the evidence left the court in doubt that the gun and ammunition were found in the possession or exclusive control of the respondent.

Held, dismissing the appeal: the question raised in the appeal was related to the credibility of the witnesses and as the appellate court did not have the advantage of seeing and evaluating them, as the learned judge had, it would be slow to interfere. There were also serious gaps in the prosecution evidence.

FEDERAL COURT.

Mohamed Noor bin Haji Ahmad (Deputy Public Prosecutor) for the appellant.

Jagjit Singh for the respondent.

Ong Hock Sim F.J. (delivering the judgment of the Court): This is an appeal by the Public Prosecutor against the acquittal of the Respondent who had been charged in the High Court, Penang (1) with having under his control a firearm, to wit, a .38 Smith & Wesson revolver, in contravention of section 57(1)(a) of the Internal Security Act, 1960 (Act 82 — Rev. 1972) and (2) with possession of ammunition, to wit, 13 rounds of .38 bullets, in contravention of section 57(1)(b) of the same Act.

The Petition of Appeal contains 14 paragraphs, the first of which is introductory and the last praying that the acquittal be set aside. One paragraph merely said the decision was against the weight of evidence without elaborating, and others alleged the judge erred in law and in fact, even in finding that the court was left with two different versions, one given by the prosecution and the other given by the defence. We assume this was the ground abandoned at the outset by the learned deputy.

It was urged that as defence counsel proceeded to put forward the case for the defence, without a submission of no case to answer and the learned judge heard it, without noting whether the prosecution had made out its case in accordance with section 180 of the Criminal Procedure Code, it should be presumed that a case had been made out, which if unrebutted, would warrant conviction of the accused on both charges. We need only observe that in a security case, Regulation 17 requires the court to hear the defence in every case after the prosecution had closed. It is elementary that where a *prima facie* case has been made out it was then for the defence to rebut.

Here there were two versions as to the recovery of the gun. As the learned judge put it, "the first, the prosecution version clearly proving accused's guilt of the charges; and the second, while not necessarily proving accused's innocence, entitling him to an acquittal if this version raised any doubt in the mind of the court." In view of this finding, we must assume the court was left in some doubt as to the truth of the prosecution story.

It was perhaps unfortunate that the learned judge permitted himself to be drawn into the matter of ownership of the gun, which in our view is irrelevant to the charge. He says in one place "as the evidence stands, while it may be that this revolver belongs to the accused" and in another "the defence has raised a doubt in my mind as to whether the ownership of the gun has been strictly proved by the prosecution.... For all I know, he may be the owner of the gun." We, however, find basis for the conclusion that he rejected the evidence of PW1 and PW2, in regard to both the gun and the ammunition when he says "in view of the consistency of the defence story that the gun and ammunition were found as a result of a search" and "the court is satisfied that a gun and ammunition were recovered from near the accused." "The court," he says, "is left in some doubt as to the proof of possession of the gun and ammunition." In his opinion, "as far as the court is concerned, the evidence before it must be of such a nature that it is left in no doubt that the gun and ammunition were found in the possession or exclusive control of the accused."

The two charges relate to capital offences. In essence, the question raised in this appeal is the credibility of the witnesses. We have not the advantage of seeing and hearing them, as the learned judge had. As an Appellate Court we should be slow to interfere. It may be that we might have arrived at a different evaluation of the prosecution evidence. We cannot say, however, that the learned judge was not entitled to the view he did. There were serious gaps in the prosecution evidence. Photographs were taken five days after the arrest. No key was produced and there was no evidence that the position of the objects shown were as it was on the night of June 24. The oversight in not sending the gun for taking of finger-prints and comparing with finger-prints of the accused, e.g. on his identity card, might have been explained but in our view was inexcusable, having regard to the charges framed.

We upheld the decision of the judge and dismissed the appeal.

Appeal dismissed.

Solicitors: *Jagjit Singh & Co.*